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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAVANNI MUNGUIA-BROWN, et al.,
Plaintiffs,
v.
EQUITY RESIDENTIAL, et al.,
Defendants.

Case No. [16-cv-01225-JSW](#) (MEJ)

DISCOVERY ORDER

Re: Dkt. Nos. 52, 53, 54, 55, 56

INTRODUCTION

Pending before the Court are five discovery letter briefs. *See* Dkt. Nos. 52-56. The Court scheduled a telephonic conference for June 20, 2017 to address the parties' disputes (Notice, Dkt. No. 57), but Counsel for Plaintiffs informed the undersigned's courtroom deputy by email that the parties would be unavailable to speak with the Court at that time because they would be attending a deposition in this matter. In the interest of time, the Court resolves these letter briefs without the benefit of oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7-1(b).

Having considered the parties' positions, the relevant legal authority, and the record in this case, the Court issues the following order.

BACKGROUND

In this putative class action, Plaintiffs allege that since 2008, Defendants have charged their tenants late fees that violate California Civil Code § 1671. *See* First Ltr. Br. at 1, Dkt. No. 52. Whether the provision is lawful under California law depends in part on whether Defendants adopted the late fee as an attempt to recover actual costs they incurred as a result of late rent payments, or whether late fees serve as a source of profits. *See* Second Ltr. Br. at 1, Dkt. No. 53. The Presiding Judge in this matter referred discovery matters to the undersigned. *See* Referral

1 Order, Dkt. No. 49. Plaintiffs’ deadline for moving for class certification is August 18, 2017.
2 First Ltr. Br. at 4.

3 **LEGAL STANDARD**

4 Federal Rule of Civil Procedure 26 provides that a party may obtain discovery “regarding
5 any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the
6 needs of the case[.]” Fed. R. Civ. P. 26(b)(1). Factors to consider include “the importance of the
7 issues at stake in the action, the amount in controversy, the parties’ relative access to relevant
8 information, the parties’ resources, the importance of the discovery in resolving the issues, and
9 whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.*
10 Discovery need not be admissible in evidence to be discoverable. *Id.* However, “[t]he parties and
11 the court have a collective responsibility to consider the proportionality of all discovery and
12 consider it in resolving discovery disputes.” Fed. R. Civ. P. 26 advisory committee notes (2015
13 amendments). Thus, there is “a shared responsibility on all the parties to consider the factors
14 bearing on proportionality before propounding discovery requests, issuing responses and
15 objections, or raising discovery disputes before the courts.” *Salazar v. McDonald’s Corp.*, 2016
16 WL 736213, at *2 (N.D. Cal. Feb. 25, 2016); *Goes Int’l, AB v. Dodur Ltd.*, 2016 WL 427369, at
17 *4 (N.D. Cal. Feb. 4, 2016) (citing advisory committee notes for proposition that parties share a
18 “collective responsibility” to consider proportionality and requiring that “[b]oth parties . . . tailor
19 their efforts to the needs of th[e] case”).

20 Rule 26(c) “confers broad discretion on the trial court to decide when a protective order is
21 appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S.
22 20, 36 (1984). “The court may, for good cause, issue an order to protect a party or person from
23 annoyance, embarrassment, oppression, or undue burden or expense,” including by (1) prohibiting
24 disclosure or discovery; (2) conditioning disclosure or discovery on specified terms; (3)
25 preventing inquiry into certain matters; or (4) limiting the scope of disclosure or discovery to
26 certain matters. Fed. R. Civ. P. 26(c)(1).

27 **DISCUSSION**

28 The Court explicitly ordered the parties to discuss the proportionality of the disputed

1 requests during their in-person meet and confer efforts. *See* Order, Dkt. No. 50. Despite this prior
2 guidance, Plaintiffs do not address the proportionality of their requests in the letter briefs.

3 **A. Emails of Custodians Involved in Decision to Change Late Fee Policy in 2008**

4 Plaintiffs (1) seek the identity of employees involved in the decision to adopt the late fee
5 policy in 2008; (2) request that Defendants certify whether the email accounts for those employees
6 have been destroyed, and if not, the format in which the emails still exist; (3) ask the Court to
7 order Defendants to search any emails that exist in searchable format using six search terms; and
8 (4) demand Defendants explain to the Court in writing “whether such emails have, in fact, been
9 deleted, or whether they are recoverable.” *See* First Ltr. Br. at 3-4.

10 Defendants respond that they have not refused to identify custodians, that the at-issue
11 custodians stopped working for Equity Residential (the “Company”) “long before” Plaintiffs filed
12 this lawsuit, and that emails from the relevant time period no longer exist unless they were
13 specifically saved into an electronic file or printed and saved in a hard copy folder. *Id.* at 4.
14 Defendants have searched those potential repositories and produced the responsive information.
15 *Id.*

16 No later than June 30, 2017, Defendants shall file a declaration describing when the
17 Company’s current email system was implemented, whether emails from departed employees
18 migrated to the new system or otherwise preserved within the new email system, and what and
19 how data associated with the old system were preserved. The parties have discussed searching for
20 data associated with Cummings, O’Shea, and Santee. *Id.* at 3. In the declaration, Defendants shall
21 identify any other custodians who were involved in the decision to adopt the late fee at issue in
22 this lawsuit. Defendants shall state each of these custodians’ dates of employment with the
23 Company. For each custodian identified, Defendants also shall confirm that they searched
24 electronic and hard-copy files for responsive information, and describe the searches they
25 conducted. The Court may order further briefing or further discovery based on the declaration.

26 **B. Draft Budgets**

27 Plaintiffs request Defendants produce draft budgets provided to the approximately 144
28 properties at issue in this case between 2010 to present. Second Ltr. Br. at 1-2, Dkt. No. 53. They

1 believe these documents will show Defendants’ anticipated late fee revenues as well as costs,
2 including costs arising from late payment. *Id.* at 1 (“Whether Defendants view late fees as a profit
3 source, as opposed to merely a recoupment of costs, is directly relevant to the common, classwide
4 question of whether Defendants’ late-fee policy is an invalid liquidated damages provision.”).
5 Defendants object that the spreadsheets at issue contain 220 rows of financial data, only one of
6 which relates to late fees; that the request is not proportional to the needs of the case and unduly
7 burdensome because the information is not relevant to class certification; and that Plaintiff’s
8 theory makes no sense because “[t]he payment of any late fee, no matter how small, constitutes
9 income (i.e., money received).” *Id.* at 3. They also object the documents are confidential.
10 Plaintiffs respond a protective order was entered in the action (*see* Dkt. No. 44), and that discovery
11 is not bifurcated.

12 The Court finds the information regarding late fees is relevant to Plaintiffs’ claims, and
13 that Plaintiffs are entitled to see discover the financial information that may be contained in the
14 budget documents, not just the one line Defendants argue is relevant. Defendants do not explain
15 why, and the undersigned finds no indication that, the protective order inadequately protects this
16 type of information. Plaintiffs’ request, however, is not proportional to the needs of the case, at
17 least at this stage of the proceedings. No later than July 7, 2017, Defendants shall produce un-
18 redacted budgets for years 2010 to the present for the two properties where Plaintiffs lived.

19 **C. Employees with Knowledge of PwC Report**

20 Plaintiffs served an interrogatory asking Defendants to identify “all individuals who are or
21 were employed by any Defendant or any affiliate thereof who have knowledge about the contents
22 of the PwC Report.” Third Ltr. Br., Dkt. No. 54. Defendants answered with a single name, in-
23 house lawyer James Fiffer. Plaintiffs complain that Defendants will not state in their interrogatory
24 response that Mr. Fiffer was the “only” current or former employee of EQR or its affiliates with
25 knowledge of the PwC Report. Defendants have provided a verified original and supplemental
26 interrogatory response that objects to the request on a number of grounds and reiterates that Jim
27 Fiffer has knowledge of the report. *See* Third. Ltr. Br., Ex. A (Responses to Interrogatories). The
28 Court agrees this is responsive to the Interrogatory and that there is nothing to add.

1 **D. Redactions**

2 Plaintiffs argue Defendants’ “wholesale redaction” of responsive documents on relevance
3 grounds is improper. *See* Fourth Ltr. Br., Dtk. No. 55. Plaintiffs do not suggest any basis for
4 concluding that any of the redacted information was in fact relevant. On the other hand,
5 Defendants do not identify any permissible basis for redacting this information; they argue only
6 that the unredacted headers allow Plaintiffs to confirm that the document is not “even remotely
7 germane” to the lawsuit. Defendants suggest the Court review the redactions in camera.
8 The Court declines Defendants’ invitation to review the redactions. No later than July 7, 2017,
9 Defendants shall produce to Plaintiffs un-redacted versions of the documents. Within two weeks
10 of receiving the documents, Plaintiffs shall file a status report describing any relevant information
11 that was redacted. Within one week of receiving the status report, Defendants shall respond. If
12 relevant information was redacted, Defendants shall shoulder the costs of reproducing the
13 information; if no relevant information was redacted, Plaintiffs shall do so.

14 **E. Defendants’ Costs**

15 Plaintiffs request Defendants produce documents pertaining to three categories of “costs”
16 Defendants incur when tenants pay their rent late: the cost of implementing the computer system
17 Defendants use to track rent payments; the cost of Defendants’ loss-of-use-funds; and aggregate
18 collection agency costs and contractual arrangements with collection agencies. Fifth Ltr. Br., Dkt.
19 No. 56. Defendants object the request is burdensome. *Id.* at 3.

20 The Court finds the information is relevant to Plaintiffs’ claims, but that the request is not
21 proportional to the needs of the case, at least at this stage of the proceedings. No later than July
22 17, 2017, Defendants shall produce responsive documents relating to the three categories of
23 “costs” described above from 2010 to the present for the two properties at which Plaintiffs resided.

24 **CONCLUSION**

25 The undersigned appreciates that discovery has not been bifurcated by the Presiding Judge,
26 and that Plaintiffs are entitled to both merits and class discovery. Nevertheless, unless and until
27 the Presiding Judge certifies a class, the undersigned finds the scope of some of Plaintiffs’
28 discovery requests is much too expansive. Should a class be certified, and should Plaintiffs be

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able to show their requests are proportional to the needs of the case, they may renew their requests.

IT IS SO ORDERED.

Dated: June 20, 2017



MARIA-ELENA JAMES
United States Magistrate Judge